WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

December 14, 2007

VIA ELECTRONIC DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street S.W.
Washington, D.C. 20554

Re: *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, MM Dkt. No. 92-264

Dear Ms. Dortch:

On behalf of Comcast Corporation ("Comcast"), the undersigned counsel respectfully submits this ex parte filing in order to ensure that the Commission has a complete record on which to base any decision it reaches in the above-captioned proceeding.

In *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001), the United States Court of Appeals for the D.C. Circuit reversed the Commission's prior 30 percent cable ownership cap. The court emphasized that, in revisiting the ownership rule on remand, the Commission would have to "take account" of the impact of competition in the MVPD marketplace. *Id.* at 1134. As the attached documents (summarized or quoted below) demonstrate, competition in the MVPD marketplace today is considerably more vibrant than in 2001 when the court issued its decision. This evidence supplements the record of robust and growing marketplace competition already before the Commission in this proceeding. The record makes clear that the type of 30 percent cap the court rejected six years ago cannot be justified today. In fact, the evidence of marketplace transformation, rapidly increasing facilities-based competition, technological innovations, and other factors in the record severely limits the Commission's ability to justify -- let alone lawfully impose -- any cable ownership limit:

Court Cases

***Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 149 (2d. Cir. 2007).**

- "[I]n markets where [Time Warner Cable] is the franchisee, DIRECTV and other satellite providers pose the greatest threat to its market share. The competition in these markets for new customers is extremely fierce, a fact to which the advertisements challenged in this case attest."

Letters from Members of Congress

Senators Jim DeMint, Kay Bailey Hutchison, John E. Sununu, and Gordon Smith (Nov. 26, 2007).

- "[T]he telecommunications and technology industries in the United States are experiencing unprecedented transformation that is fundamentally changing the way we live our lives. . . . We believe introducing new regulation into this environment, particularly on only one segment of a converging industry, could be disruptive."

Joe Barton, Ranking Member, and 23 Members of the House Committee on Energy and Commerce (Nov. 20, 2007).

- "Today our nation enjoys access to more diverse sources of video programming than ever before. . . . Cable faces intense competition from satellite providers, and cable and satellite companies offer many additional networks. Wireline phone companies have entered the video business, as well, helped in part by the Commission's deregulatory postures. . . . Wireless phone companies are similarly starting to offer video content. One of the largest contributors to the video revolution is the Internet, which is giving Americans unprecedented control over what, where, and when they watch. . . . This is no accident. Deregulatory voice, video, and data policies launched by Congress and the Commission . . . have spurred an outpouring of investment."

John Boehner, House Republican Leader (Nov. 19, 2007).

- "Deregulatory voice, video, and data policies supported in the past by Congress, the FCC, and the Administration spurred the investment that created the vibrant and innovative video environment we have today. Yet press reports indicate that you may even be considering imposing horizontal ownership caps on the cable industry. With more competition now than ever before, now is not the time to embark on regulatory proposals that run contrary to Congress' intent on these deregulatory policies."

Commissioner Statements and Commission Releases

Commissioner Robert M. McDowell, FCC, Remarks at the Media Institute Luncheon 8 (Nov. 19, 2007).

- "In 1975, cable was in its infancy and had yet to develop programming. Now we have DBS, telephone companies offering video, cable overbuilders, the Internet and its millions of websites, iPods, satellite radio, cell phones, Wi-Fi, video-on-demand, digital video recorders, pay-per-view, etc. There is no disputing that the marketplace has been transformed by technological advances and business innovations into the most competitive multimedia environment in human history. Consumers have more choices and more control over what they read, watch and listen to than ever."

News Release, FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* 1 (Nov. 27, 2007).

- "The FCC finds that . . . competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation [and the] FCC reports that almost all consumers are able to obtain programming through over-the-air broadcast television, a cable system, and at least two DBS providers."

__Analyst Reports__

Thomas W. Eagan & Dorothy P. Tse, Oppenheimer & Co., *US Cable and Satellite: Regulatory Risk Worsens with FCC 70/70 Imposition* 1 (Nov. 12, 2007).

- "Ultimately, we would be surprised if the FCC's new approach to regulating the cable industry was enforceable. The 70/70 rule is from telecommunications legislation before satellite TV became such a major player. It now serve[s] 33% of TVHHs. Today satellite TV accounts for the vast majority of the new TV subscribers. In 3Q07, we estimate that the two satellite TV players, DIRECTV and EchoStar added 78% of new pay TV subscribers (350k of the 446k net added subscribers)."

Doug Mitchelson, Deutsche Bank, *Cable Spotlight: Ferocious FCC's Bark Worse Than Its Bite* 2 (Nov. 12, 2007).

- "[T]his is an old law that was created when cable was a monopoly. It is possible, but it seems questionable that Congress would agree with its implementation in this much more competitive environment where DBS has taken one-third of pay TV subscribers and the RBOCs are scaling quickly and given their last major regulatory move was the deregulation of cable with the Telecommunications Act of 1996."

Spencer Wang et al., Bear Stearns, *Just When You Thought It Couldn't Get Worse . . . The FCC Prepares To Impose New Regulation* 1 (Nov. 11, 2007).

- "We find it surprising the FCC would propose to re-regulate cable given increasing competition (DBS, RBOCs and over time, web video). In fact, cable basic subs have been flat to down since '00. The FCC's action also comes in stark contrast to its support of RBOC mergers."

Scott Sleek & Mitchell Shapiro, Pike & Fischer, *Cross-Industry Analysis: Cable vs. DBS Operators* (3d Quarter 2007).

- "The 3Q results indicate the rapid increase in competition faced by the cable MSOs, both from DBS providers aggressively marketing their high-definition capabilities and from RBOCs' ability to offer digital TV services and service bundles, whether over their own networks or via partnerships with the DBS providers. The RBOCs' super-fast fiber-optic services could pose a particularly strong competitive challenge, especially as cable operators appear to be struggling with some capacity problems."

Jonathan Chaplin & Thomas S. Champion, JP Morgan, *Comcast Corp: Subscriber Numbers Mar 3Q Results* 2 (Oct. 26, 2007).

- Commenting on Comcast's third quarter financial results and its decline in customers, JPMorgan stated that the most significant factor for "the poor results" was "RBOC competition is intensifying."

Spencer Wang et al., Bear Stearns, *Comcast Corp.: Resetting Expectations; 3Q07 Review* 2 (Oct. 25, 2007).

- "Management noted on today's call that the competitive landscape is changing and that competition from the RBOCs and telco/DBS bundles is getting stronger. The pricing environment is getting tougher with cable's competitors offering significant discounts and both the RBOCs and DBS operators increasing their marketing efforts."

Filings at the Commission

William L. Kovacs, Vice President, Environment, Technology & Regulatory Affairs, Chamber of Commerce of the United States of America in MB Dkt. No. 06-189 (Nov. 20, 2007).

- "[T]oday, consumers can choose among hundreds of channels and can receive their service from cable, DBS, or new entrants, such as their local phone company" and "[t]he Internet is changing how people view video."

Peter Chernin, President and Chief Operating Officer, News Corporation, Robert Iger, President and Chief Executive Officer, The Walt Disney Company, Phillipe Dauman, Chief Executive Officer, Viacom, and Jeff Zucker, President and Chief Executive Officer, NBC Universal in MB Dkt. Nos. 06-189 and 07-42 (Nov. 20, 2007).

- "The reality is that consumers today enjoy a wider range of media choices than at any time in history. In addition to the cable, satellite and telco choices and options . . . the Internet has emerged as a new and rapidly growing source of video media services. . . . Because of the vibrant competition in both programming and distribution, and because of the myriad options and alternatives available to consumers, there is no conceivable justification for government intervention into this marketplace."

Comcast in MB Dkt. No. 07-42 (Oct. 12, 2007).

- "The number of independent networks has skyrocketed, and the range and depth of programming choices available to consumers has increased markedly; in the past 15 years, over 400 national programming networks have been launched and are currently being distributed; the number of national programming networks has grown from around 100 in 1992 to around 500 today. Contemporaneously, vertical integration between cable operators and programmers has decreased from over 50% in 1992 to less than 20% today. At the same time, competition among distributors is fierce and growing; fully 30% of MVPD homes are served by satellite, not cable, and the giant regional Bell companies are investing enormous sums to bring consumers another cable alternative. As broadband connections proliferate, consumers are increasingly watching video over the Internet."

Comcast in MB Dkt No. 07-42 (Sept. 11, 2007).

- "Competition among multichannel video programming distributors . . . is more intense than ever, and video downloads, streaming video, wireless broadband, and a host of other new technologies, services, and products are further expanding consumer choice."

Time Warner in MB Dkt No. 07-42 (Sept. 11, 2007).

- "[T]he competition provided on a national level by two national DBS providers and, increasingly, consumers' access to a competing wireline MVPD operated by a well-financed local telephone company . . . help ensure that a cable operator cannot afford to refuse to carry desirable (and desired) programming. . . . And with the arrival on the scene of Internet-based services such as video blogs, YouTube, MySpace, Facebook, etc., . . . 'electronic soapbox' goals . . . are being met in ways that neither Congress nor the Commission ever imagined."

Cablevision Systems Corporation ("Cablevision") in MB Dkt No. 07-29 (Sept. 10, 2007).

- Cablevision describes the "emergence of durable competition" and states that "[s]ince enactment of the program access provisions, the share of MVPD customers served by cable's competitors has increased more than ten-fold[.]"

Cablevision in MB Dkt No. 07-29 (Sept. 5, 2007).

- Cablevision describes how the "marketplace is more competitive than in 1992 and 2002" and states that cable "operators facing well-funded competitors should have all competitive tools available to them."

Comcast in MB Dkt No. 07-29 (Aug. 16, 2007).

- Comcast explains how "competition in the video marketplace is vibrant and growing."

Comcast in MB Dkt Nos. 06-189 and 07-29 (June 13, 2007).

- "[C]ompetition in the distribution of video programming is intense and getting more so each day . . . Vertical integration between programming networks and cable operators . . . has plummeted." Comcast provides specific information and examples to describe rapid competitive developments in the video marketplace.

Cablevision in MB Dkt. No. 07-29 (Apr. 16, 2007).

- "The actual facts refute any claim that cable operators hold sway over the programming market: 80 percent of the programming networks available to MVPDs lack any cable affiliation, cable's ownership of networks in the 'top 20' or 'top 40' has steadily declined in the past five years, the number of new programming networks created during that time has nearly doubled, and entry barriers into the video content supply market have crumbled -- as evidence by the explosion of video offerings available via the Internet."

Cablevision in MB Dkt No. 07-29 (Apr. 2, 2007).

- "The goal of competition and diversity in video distribution . . . has been met." Cablevision attaches a "full discussion of the competitiveness of the video distribution market" to its submission.

Comcast in MB Dkt No. 07-29 (Apr. 2, 2007).

- Comcast demonstrates that the "video marketplace is robustly competitive and rapidly evolving" and argues that "all players deserve equal footing."

National Cable & Telecommunications Association ("NCTA") in MB Dkt No. 07-29 (Apr. 2, 2007).

- "Vibrant competition is the hallmark of today's video marketplace."

Comcast in MB Dkt No. 06-189 (Mar. 30, 2007).

- "[R]ecent developments [provide] further confirmation of the intense competition, relentless innovation, and abundant choice in the video marketplace." Comcast provides a summary of notable marketplace developments between December 29, 2006 and March 30, 2007.

Cox Communications, Inc. in MB Dkt No. 06-189 (Dec. 29, 2006).

- "There are simply no Cox markets where customers are beholden to any one provider for <u>any</u> communications service – with all markets providing at least three choices for multi-channel video service alone, and a number providing four choices or more. Competition, therefore, is flourishing in the marketplace – where it should – without government intervention."

NCTA in MB Dkt No. 06-189 (Dec. 29, 2006).

- NCTA describes the numerous reasons why the "Commission should report to Congress once and for all that the delivery of video programming is fully competitive. And in light of this, [the reasons why] the Commission should reject proposals for further government intrusion in the working of the competitive marketplace and should encourage Congress to do the same."

Viacom Inc., MTV Networks and Black Entertainment Television LLC in MB Dkt No. 06-189 (Dec. 29, 2006).

- "Consumers today have access to an unprecedented number of video programming choices, and the competitive free market has fostered the creation of an enormous array of diverse program networks. . . . [T]he Commission should reaffirm that diversity is 'best achieved by reliance on competition among delivery systems rather than government regulation.'"

NCTA in MB Dkt No. 06-189 (Nov. 29, 2006).

- "In *each* of the three services that cable operators now provide – video, Internet, and telephone – they face, and they provide, vigorous competition. And, as a result of this competition, customers of each of these services are able to choose from a variety of options that maximize value at competitive prices."

Comcast in MB Dkt No. 05-255 (Apr. 25, 2006).

- "The battle for consumers' time and attention has always been fierce, but it is even more so now, with unprecedented numbers of video programming networks, intense and still-growing competition among multichannel video programming distributors, and enormous new quantities of information and programming being offered by broadband and mobile content, service, and application providers."

<u>Press Accounts</u>

Denise Caruso, *Media Innovations, Leaping from Lab to Screen*, N.Y. Times, June 10, 2007.

- "[R]unning a media or entertainment company in the 21st century is not for the faint of heart. The change is relentless, the learning curve sharp, and the competition both fierce and seemingly infinite."

Michael Hopkins, *SkyFILES: It's Getting Competitive Out There*, SkyREPORT, May 24, 2007.

- "There's no doubt the multiplatform business is getting bigger and much more competitive. Deals, company milestones and other strategic maneuvers . . . demonstrate that companies within this industry aren't going to give up market share without a fight."

Mike Snider, *HDTV's Clarity Gives Rise To New Channels*, USA Today, Nov. 26, 2007 (quoting Phil Swann, President, TVPredictions.com).

- "[C]able and satellite systems are adding HD programming as quickly as they can to woo and keep subscribers. 'There's the equivalent of an arms race to get HD programming out there . . . They are basically sitting there like two gunslingers, staring each other down and saying, "I can outdo you."'"

***Is Broadband The Future Of TV?*, Retail BRIDGE, Nov. 19, 2007 (quoting Gerry Kaufhold, Analyst, In-Stat).**

- "Today's stable and profitable subscription TV services are facing new competition from online and mobile entertainment services, and from new, high-quality packaged good, such as HD-DVD and Blu-ray discs. . . . The very nature of what consumers call 'entertainment' is undergoing a profound change in which the ability to instantly share content with friends, family members, and those connected on social networks or buddy lists is creating micro user communities that replace traditional entertainment sources such as TV programs. As more high-quality content becomes available online, savvy consumers are considering ways to reduce their monthly bills by getting everything from the internet."

Evie Haskill, *Sharpen Your Knives*, SkyBOX, Nov. 5, 2007 (quoting James McQuivey, Analyst, Forrester Research).

- "As consumers get more access to their favorite TV shows and movies through their internet connection, they're going to start asking themselves why they're paying their cable bills. It's time for cable companies and telco TV providers to go on fear watch."

Dionne Searcey, *Cable's Picture Gets Fuzzier*, Wall St. J. Nov. 8, 2007, at B3.

- "In the ever-intensifying wars between the cable and phone companies, someone is always up, or always down. Right now it is cable that is perceived as being on the defensive."

Peter Grant & Dionne Searcey, *Verizon's FiOS Challenges Cable's Clout*, Wall St. J., Oct. 24, 2007, at A12.

- "After years of promises, Verizon Communications Inc. is making significant headway with its $18 billion effort to roll out television and faster Internet service, posing a difficult new competitive threat for the cable industry. Two years after launching its FiOS service, Verizon has signed up half a million TV subscribers and, as of the second quarter, was adding 2,600 customers per business day."

In closing, we note that the Commission already has a series of regulations in place to promote diversity in programming, and recently has been pursuing additional measures to promote programming diversity through leased access, program carriage, and other rules. In light of the fundamental changes in the competitive marketplace outlined above and throughout the Commission's record in this proceeding, and in light of the sensitive First Amendment considerations at stake, we believe that any effort by the Commission to reimpose a horizontal ownership cap constitutes a belts, suspenders, rubber bands, and safety pins approach to regulation – grossly excessive, disproportionate to any demonstrated need, and flawed as a matter of law and policy. We once again respectfully urge the Commission to respond to the competitive realities of the marketplace in the 21st century and not adopt a new horizontal ownership cap.

Sincerely,

<u>/s/ Megan Anne Stull</u>
Megan Anne Stull
Counsel for Comcast Corporation

Attachments